Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-503

BILLY D. COOK, LOULA JUANITA MILTON ADAMS, MRS. W. P. WRIGHT, *Petitioners*

v.

ROGER W. HUDSON, JOHN BURT, JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER, N. F. HANSON, BOARD OF EDUCATION, CALHOUN COUNTY, MISSISSIPPI, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855 (App. 30a of Petition). The opinion of the Court of Appeals for the Fifth Circuit is reported at 511 F. 2d 744 (App. 2a of the Petition). The denial

of rehearing by the Court of Appeals is reported at 515 F. 2d 762 (App. 1a of Petition).

II.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

III.

QUESTION PRESENTED

Whether a rural southern public school board, acting under a Court ordered legal and affirmative duty to eliminate racial discrimination "root and branch" from its school system, be compelled to reemploy classroom teachers who send their own children to a racially discriminatory, segregated, all white, private secular academy.

IV.

CONSTITUTIONAL PROVISIONS AND REGULATION

The constitutional provisions and regulation involved are adequately set forth in the Petition.

V.

STATEMENT OF THE CASE

Prior to the 1973-1974 school year, Petitioners Billy D. Cook, Loula Juanita Milton Adams, and Mrs. W. P. Wright, were employed as teachers in the public school system of Calhoun County, Mississippi. On August 9, 1968, the United States District Court for the Northern District of Mississippi entered an Order directing the immediate desegregation of the Calhoun County

schools. The Calhoun County school board was further under a duty to take affirmative action to eliminate racial discrimination from the schools within its district "root and branch" and to completely abolish the dual system and create a unitary desegregated school system. On August 28, 1968, twenty (20) days after the desegregation Order was entered, various citizens of Calhoun County, Mississippi, incorporated the Calhoun Educational Foundation Corporation for the purpose of establishing a private academy (R. Vol. II, page 72; Respondent's Exhibit 6). The Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, hereinafter referred to as Calhoun Academy, is a racially discriminatory, all white, private school.[1] Furthermore, Petitioner Cook, the present Headmaster of the Calhoun Academy, testified that not only were no blacks enrolled in the Calhoun Academy and that none had ever applied, but furthermore, if a black did apply for admission to Calhoun Academy, he would not be admitted. (R. Vol. I, pages 75-76). This testimony is uncontradicted. The District Court, as a

[1] The Calhoun Academy, along with other Mississippi private academies, lost its tax exempt status with Internal Revenue Service as a result of the decision of the United States District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971). The Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, presently does not have tax exempt status under Section 501(c)(3) of the Internal Revenue Code as a result of their failure to adopt racially non-discriminatory admissions policies. In addition, the Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, has not qualified to receive free textbooks from the State of Mississippi pursuant to *Norwood* v. *Harrison*, 93 S. Ct. 2804 (1973). Also, substantial financial support to the Calhoun Academy is received from the Calhoun County Citizens Counsel (R. Vol. II, page 73, Respondent's Exhibit 7; R. Vol. II, pages 25-30, Respondent's Exhibit 1). (Also, see opinion of District Court 365 F. Supp. 855 at 857, n. 1).

finding of fact, found the Calhoun Academy to be a racially discriminatory, all white, private school, similar to other so called "segregation academies," established throughout the State of Mississippi in the wake of public school desegregation to provide a haven for segregated education.

In November 1972, after deliberate consideration, the Calhoun County Board of Education adopted a policy whereby prior to the employment of a new teacher or the reemployment of an existing teacher, the children of any such teacher, *if living in Calhoun County, Mississippi,* would be required to attend the public schools of said Calhoun County, or such teacher would not be employed or reemployed. There are no religious or parochial private schools in Calhoun County. Furthermore, the only private school in Calhoun County is the Calhoun Academy (R. Vol. I, pages 209-210; Vol. I, pages 21-22). School board members and school officials testified that when the policy was adopted the private school which was the impetus of the adoption of the policy was the Calhoun Academy, as such was the only private school in Calhoun County (R. Vol. II, pages 21-22). Further, the District Court found, as a finding of fact, that the school officials, teachers and the community knew that the policy was to apply to the Calhoun Academy. Respondents further testified that because some of the public school teachers had their own children enrolled in the Calhoun Academy, much controversy among parents, teachers and students resulted therefrom (R. Vol. II, pages 23-24). The Respondents, in an effort to comply with their affirmative duty to eliminate racial discrimination "root and branch" from the Calhoun County public schools, and for the further purpose of assuring the complete and

total support, loyalty and dedication of the teachers and the Calhoun County public schools to a desegregated public school system, and to further the best interests of the children in the Calhoun County schools, and to maintain teacher effectiveness and performance, adopted the above policy. (R. Vol. I, pages 28, 154-155, 182; R. Vol. II, pages 18, 22, Respondent's Exhibits 5 and 6).

During the 1972-1973 school year, the Petitioners were employed as teachers in the Calhoun County public school system. Each of the Petitioners had children of school age, who they sent to the Calhoun Academy, a racially discriminatory, all white, private school in Calhoun County. Prior to the end of the 1972-1973 school year, the Petitioners were advised that if their children were enrolled in the Calhoun Academy for the coming school year, they would not be reemployed by the school board. Accordingly, the Petitioners were not rehired for the 1973-1974 school year.

Two experts in the field of educational psychology testified, uncontradicted, that the action taken by the Calhoun County School Board is reasonably and significantly related to the job performance and effectiveness of a classroom teacher, and further, that said action on the part of the school board is imperative if the best interests of the school children attending the public schools of Calhoun County, Mississippi, are to be served. These experts expressed the opinion that the children in the classes of a teacher sending his own child to a racially discriminatory, all white, private school, would perceive the teacher as rejecting them and derive a sense and feeling of inferiority. A general negative educational atmosphere would prevail. These educational psychology experts further testified that

the expectations of the teacher of the performance of the public school children, would necessarily be lower, and as a result thereof, the public school children in their classes would not achieve their highest educational level, therefore effecting the classroom effectiveness and performance of the teacher. (R. Vol. I, pages 106-113; 128-136; 193-194).[2]

Although the Petitioners gave various reasons for sending their own children to the Calhoun Academy, these reasons were clearly impeached on cross-examination and it is clear that the reason that the Petitioners sent their children to the Calhoun Academy was to keep them from attending the integrated public schools of Calhoun County, Mississippi. One of the Petitioners testified that her child had a speech problem and that she sent her child to the Calhoun Academy for this reason. (R. Vol. I, page 42). However, it was shown at the trial of this cause that the Calhoun Academy had no speech therapist, whereas the Calhoun County schools had several, and in particular one which was black. (R. Vol. I, pages 48-51; 62; 63; 156-157). Another Petitioner testified that she was not dedicated to a desegregated school system. This particular Petitioner further testified that she spent substantial amounts of time and energy involved in the affairs of Calhoun Academy, such as fund raising and parent-teacher events. (R. Vol. I, pages 91; 94-98). The third Petitioner, Cook, testified that the reason that he had sent his child to the Calhoun Academy was that he preferred not to have his child on the same campus with him. (R. Vol. I, pages 64; 65). However, after the Petitioner Cook was not rehired by the Calhoun County public schools, he became the Headmaster of the Calhoun Academy, and his child is presently attending school on the same campus with him. (R. Vol. I, pages 75-76; 80-81; 83; 86-87). The District Court, as a finding of fact, found that the dominant, if not sole reason why each of the Petitioners enrolled their children in the Calhoun Academy was to avoid the desegregated public school system in Calhoun County, Mississippi. (365 F. Supp. at 858).

[2] The testimony of the educational psychologists and the findings of the District Court in this regard parallels those of the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and are remarkably similar to those in *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143 at 153-157, 161-162 (W.D. Michigan 1973).

The District Court, after extensive evidentiary hearings in the subject matter, entered its Order denying the Petitioners the relief which they sought and dismissing their Complaint against the Respondents. Petitioners then prosecuted an appeal in the United States Court of Appeals for the Fifth Circuit, where the District Court's action was affirmed. A petition for rehearing en banc was denied.

VI.

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW IS CLEARLY CORRECT

a. Balancing of Interest and the Equal Protection Claim

The issue in this case, as recognized by the District Court and the Court of Appeals, is an extremely limited one. Irrespective of the rhetoric propounded by the Petitioners, this case only presents one precise issue. Must the Calhoun County school board, in its effort to fulfill its Court ordered affirmative duty to eliminate racial discrimination "root and branch" from

its school system,[3] be compelled to reemploy these three Petitioner teachers, who by sending their own children to a racially discriminatory, segregated, all white, private secular academy, cast a pervasive influence on the educational process of the public schools of Calhoun County and infringe upon the equal opportunity of the black school children in that system? In balancing the interests of these three individual Petitioner teachers against the interests of the state, the board of education of Calhoun County, the public school system of Calhoun County, and the children attending the school system, Petitioners have failed to recognize that First Amendment rights of teachers are applied in light of the *special* characteristics of the school environment. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969). It is the special characteristics of the school environment, particularly where a school board, as here, is under a Court ordered affirmative duty to eliminate racial discrimination from its school system "root and branch," that validates the questioned action of the school board. None of the cases cited by Petitioners involve school boards under affirmative duties to eliminate racial discrimination from their schools. As recognized in *Green* v. *Connallly,* 330 F. Supp. 1150 (D.C. 1971), "[t]here is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional grounds . . . That government interest is dominant over other constitutional interests to the extent there is a complete and unavoidable con-

[3] *Green* v. *County School Board,* 391 U.S. 430 (1968); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *United States of America* v. *Calhoun County Board of Education,* No. WC 6637, N.D. Mississippi, presently pending before the District Court.

flict." (330 F. Supp. at 167; emphasis added). As *Green* recognized the constitutional strength of the government's interests in preventing even private racial discrimination, and because of the special characteristics of the environment of the public schools, the action of the school board as applied to these three Petitioners, must be viewed in full context of elimination of all forms of racial discrimination for the public schools of Calhoun County. As the action of the school board is but a tool of eliminating racial discrimination from the public schools of Calhoun County, it becomes clear that the First Amendment rights of the Petitioners, if any, coming in conflict with this action must yield. This Court recognized in *Norwood* v. *Harrison,* 413 U.S. 455 (1973) that:

> Under Brown v. Board of Education . . . discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to define groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregating is desirable in education. (413 U.S. at 469)

A public school teacher, who sends his children to such private school, "manifests, by (his) own actions" the same private belief to his public school students, thereby exerting a pervasive influence on the educational process of the public schools and detrimentally reducing his effectiveness and performance as a teacher. "A sense of inferiority affects the motivation of a child to learn." *Brown* v. *Board of Education,* 347 U.S. at 494. Furthermore, as "[a] teacher works in a sensitive area in a classroom" . . . as "he shapes the attitude of young minds towards the society in which they

live . . ." the Respondents are compelled to be vitally concerned in this regard. *Adler* v. *Board of Education of New York City,* 342 U.S. 485 (1952). Racial discrimination in state operated schools is barred by the Constitution and "[i]t is also axiomatic that [they] may not induce, encourage or promote private persons to accomplish that which is constitutionally forbidden to accomplish." *Norwood* v. *Harrison, supra,* 93 S. Ct. at 2810. When viewed in this light, it becomes clear that the decision below is correct.

b. The Due Process Claim

Petitioners also contend that the policy and action of the Calhoun County School Board created an irrebuttable presumption which they attacked as violative of the due process clause. This contention is totally without merit. Even assuming that a presumption as that supposed by the Plaintiffs was created as a result of the action of the school board, it is clear from *Norwood* v. *Harrison,* 413 U.S. 455 at 469, and *Gilmore* v. *City of Montgomery,* 473 F. 2d 832 at 835 (5th Cir. 1973), that any such supposed presumption is valid. The recognition by this Court in *Norwood* v. *Harrison* of the pervasive influence of racially discriminatory schools on the public school system has previously been discussed and does not require reiteration here. Petitioners, while relying upon *Cleveland Board of Education* v. *LaFleur* and *Cohen* v. *Chesterfield County School Board,* 414 U.S. 632 (1974), in support of their contention, fail to recognize that the experts at the trial of the cases were in unanimous agreement as to the individuality of the ability of any particular pregnant woman to continue at work past any fixed date in her pregnancy. In this regard, it should be noted that the

undisputed testimony of the educational psychologists in this case is that the presence of a teacher who sends her own child to a racially discriminatory private school, would be perceived by the students of that teacher as a rejection and they would therefore derive a sense and feeling of inferiority. The expectations of the teacher of the performance of the public school children would be lower. The classroom effectiveness and performance of the teacher would be reasonably and significantly affected. In addition, in *LaFleur* and *Cohen* this Court based its ruling on the holding that the presumptions embodied in the regulations were "neither necessarily nor universally true." It should be recognized in this regard that that is not the circumstances of the case presently before this Court. (*Norwood* v. *Harrison, supra; Gilmore* v. *City of Montgomery, supra; Brown* v. *Board of Education, supra; Oliver* v. *Kalamazoo Board of Education, supra.*) Additionally, it is implicit in the *LaFleur* and *Cohen* opinions that had the regulations and policies of the school boards been shown to have a rational relationship to a valid state interest which served as the impetus of those policies, the "irrebuttable presumption" policy would not have applied.

B. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

A case remarkably similar to the incident one and embodying many of the same issues was *Keckeisen* v. *Independent School District,* 509 F. 2d 1062 (8th Cir. 1975), petition for cert. denied, 44 U.S.L.W. 3202 (1975), wherein the Circuit Court upheld a school board's regulation prohibiting marriages between administrators and teachers. In *Keckeisen,* as in the incident case, there was uncontradicted expert testimony

in favor of the policy. In *Keckeisen,* the Plaintiffs attempted to defeat the policy basing their claim upon infringement of the fundamental right to marry. The Court recognized the fallacy of this argument wherein it stated:

> The policy in question here does not deny the two people the right to marry; it only prohibits the employment of married couples in administrator-teacher situations. (509 F. 2d at 1065)

Likewise, in the present case, Petitioners seek to defeat the policy claiming it constitutes an infringement of their right to send their children to a private school. However, such is not the case. The action of the school board here does not deny these teachers the right to send their children to the private school; it only prohibits their employment if they do send their children to the racially discriminatory Calhoun Academy. Their right to send their children to a private school is not in issue here. As observed by Judge Coleman in the Court of Appeals opinion:

> Here, the teacher-appellants seek to defeat that public right by saying that because they have a right to send their children to private schools they also have the constitutionally guaranteed right to be employed in the public schools in defiance of the considered judgment of the school board that such a practice is not good for the schools which they have assumed an obligation to foster and maintain.
>
> I simply do not believe that the Constitution may be stretched so far.
>
> We are not here dealing in isolation with the rights of parents as to the education of their children. This is only a springboard from which teachers (who also happen to be parents) are trying to

> jump to the desired result. We are confronted with altogether different claims; we are asked to hold as a matter of constitutional law that they may *command* for themselves employment in a public agency in *defiance* of the declared public policy of that agency, a policy which could have no possible purpose other than to promote the unity of, and public confidence in, the public school system. In such a collision of interest, the asserted "parental right" must yield. On balance, concerned as we are with the general, discretionary power of school boards to manage public schools, the board policy should prevail and I see nothing in the Constitution to forbid it. (511 F. 2d at 749)

In *United States Civil Service Commission* v. *National Association of Letter Carirers,* 413 U.S. 548 (1973), this Court, while expounding upon *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), observed:

> "There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear[4] to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 564.
>
> "Neither the right to associate nor the right to participate in political activities is absolute in any event (citations omitted)." 413 U.S. at 567

In light of *Letter Carriers, United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and *Keckeisen, supra,*

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[4] The importance of this statement to the present case should not be ignored. The record clearly reflects such a relationship between the Petitioners, the Calhoun Academy and the Citizens Council so as to make them willing symbiotic partners in the quest of racial segregation.

it is respectfully submitted that no important question of Federal law is present in this case.

CONCLUSION

Brown and its progeny have raised hopes that black students will at last obtain the equal educational opportunity in the public school which too long was denied them by law. These hopes seem substantial in light of this Court's mandate that school boards have an affirmative duty to eliminate racial discrimination "root and branch" from the public schools. However, this equal educational opportunity will be mocked if the lingering remnants of racial discrimination are allowed to remain in the public schools of Calhoun County. To set aside the action and policy of the Calhoun County school officials would, in effect, make the public school system an unwillingly symbiotic partner in the denial of equal educational opportunity to black students, in the discrimination and pervasive influence resulting from the presence of the three Petitioners in the Calhoun County school system and in the thwarting of the implementation of the desegregation order of the District Court.

For the above and foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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